

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Johnson and Commissioners Hodson, Huguenin, Leidigh, and Remy

**From:** Hyla P. Wagner, Senior Commission Counsel  
Scott Hallabrin, General Counsel

**Subject:** Gifts to an Agency – Repeal and Readoption of Regulation 18944.2

**Date:** May 8, 2008

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**Proposed Commission Action:** Approve the repeal and readoption of Regulation 18944.2 concerning donations to state and local agencies that result in a possible gift to a public official in the agency.

**Proposed Regulation:** The Commission is examining Regulation 18944.2 and updating it to improve disclosure of gifts to public agencies and make certain other changes. At the March 13<sup>th</sup> meeting, the Commission considered the prenotice draft of Regulation 18944.2. This memo discusses the issues raised at the March meeting and changes that have been made to the regulation. (Attachment 1 is the proposed regulation. Language added since the prenotice version is shown in bold.)

**Agency Head.** The definition of “agency head” has been changed to “an individual in whom the ultimate legal authority of an agency is vested, or who has been delegated authority to make determinations by the agency for purposes of this regulation.” Michael Martello and others representing cities commented that the definition of “agency head” contained in the prenotice version<sup>1</sup> was confusing for boards and for some cities with council/manager form of government. Under the new definition, for the many agencies that are headed by a single individual, such as a Secretary or Director, that individual is the agency head. For boards, commissions, or legislative bodies, the agency head for purposes of this regulation would be an individual who has been delegated the authority to act under the regulation (i.e., the presiding member, the executive director, the general counsel, the chief of staff of the Rules Committee, or the city manager). The definition has enough flexibility to accommodate many different types of agencies (including state executive branch agencies, boards, commissions and city councils) but still specifies a high-level official who can take action required by this gift to agency regulation.

**Internet Disclosure of Gifts to Agencies/New Form.** The proposed regulation substantially revises and updates the reporting of gifts to agencies. These payments will now be reported on a new one-page form and information about the payments will be posted on the internet. As of this writing, we have received only favorable comments on the increased reporting for gifts to agencies. Some details of the reporting provisions, in paragraph (c)(3) of

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<sup>1</sup> The prenotice version stated: “‘Agency head’ means the secretary, director, or single individual who is the official in charge of an agency. For a multi-member body that governs an agency, ‘agency head’ means the presiding member of the body.”

the regulation, have been revised since the March meeting, to coordinate with Technical Assistance's creation of the form. The draft form and instructions are attached here for the Commission and public's information. (Attachment 3.) The form will go through the usual 30-day comment period, and will be presented for the Commission to approve at an upcoming meeting. If adopted, the revised gift to agency regulation will take effect on July 1, 2008, to provide time for approval of the new form.

**Prohibition on Agencies Accepting Travel Payments for Elected Officials Under Regulation 18944.2.** The regulation proposes three new limitations on third party payments for travel: the prohibition on accepting travel for elected officials under 18944.2, the limitation to agency reimbursement rates, and the preapproval requirement. These limitations operate independently in the regulation and can be considered on their own merits; they are not necessarily a package.

In response to discussion at the March hearing, we examine the rationale for adding the prohibition on gift to agency travel for elected officials and for limiting the prohibition to elected officials. First, travel payments for elected officials seem more like a gift to the elected official as an individual, which one would expect to see reported on their statement of economic interests, than like a typical "gift to an agency." The press and public expect to see gifts to elected officials reported on their Statements of Economic Interests, rather than not publicly reported, and not limited, as previously was the case under the gift to the agency exception. Regulation 18944.2 was meant to apply to gifts to the agency operations and staff generally, not gifts to elected officials.

Second, the possibility of abuse is much greater with private sources paying for travel for elected officials. While there are some legitimate privately sponsored trips for educational or governmental purposes, many privately sponsored trips for elected officials appear to the public to be junkets. If a trip is necessary or offers important first-hand opportunities for elected officials to view a manufacturing plant or port facilities in another country, arguably the government should pay for it as official travel.

Indeed, there is no section of the Act that exempts travel paid for by a private business for an elected official from the normal gift limits and reporting requirements. Arguably, this regulation should not create an exemption where none exists in the statute. In contrast, the Act does provide that travel for a public official paid for by a foreign government or a nonprofit entity in connection with an issue of public policy is reportable on the official's SEI, but not limited. (Section 89506.) The Act also provides that elected officials may use campaign funds for travel related to a political, legislative or governmental purpose. (Section 89513.) Elected officials thus have an alternate source of funding legitimate governmental travel if their agency cannot pay for it.

In addition, it is difficult, if not impossible, for third party payments for elected official's travel to satisfy the "agency control" requirement. Like the existing regulation, the proposed language requires that the agency determine and control the use of the payment; it provides that "donor may identify a purpose for the payment, but the donor may not designate by name, title, class, or otherwise, an official who may use the payment." Under the existing regulation, it has

proved practically impossible, if not fictitious, for donors to provide a gift of travel to the agency, ostensibly “not designating” the individuals who will use the gift; the five city council members usually end up taking the trip.

At the March meeting, some asked why the prohibition was limited to elected officials and whether it should apply more broadly. The rationale for limiting the application of the prohibition to elected officials is that it is the area where the most potential for abuse exists. Private interests are less interested in gaining favor with staff-level government employees than with elected officials. In addition, applying the prohibition to elected officers as defined in Section 82020 is specific and clear. Staff again examined whether the prohibition should apply more broadly, such as to those officials listed in Section 87200 of the Act.<sup>2</sup> The problem using Section 87200 is the list is somewhat arbitrary as to which agencies it includes and which it does not. For example, at the state level, it includes the Coastal Commission, but not the Integrated Waste Management Board. At the local level, it includes high-ranking city and county officials but not members of boards or commissions running agencies such as water districts, joint powers authorities or school districts.

**Agency’s Reimbursement Rates.** The anti-lavish provision in paragraph (d)(2) caps a third party payment for an agency’s travel to the amount of the agency’s own reimbursement rates. This provision has been modified from the prenotice version to specifically refer to the state per diem rates.

**Preapproval for Travel.** At the March meeting, concerns were raised about whether adding a preauthorization requirement for travel accepted under the gift to agency exception would prove a practical impediment to travel. The regulation was redrafted to keep this requirement simple, stating that the agency head or his or her designee needs to preapprove the travel in advance of the trip. It is desirable to have the agency head or designee, such as a department head, reviewing the details and purpose of travel, deciding who to send, and considering whether the payment from the private source is appropriate for the agency to accept. The regulation anticipates that if the agency had approved travel for a particular employee who became unavailable and needed to send a different employee, the agency could do so.

**Third Party Paying Airlines and Hotels Directly.** At the March 13 meeting, another issue discussed was whether the regulation should permit third parties paying for agency travel to pay airlines and hotels directly, or whether the regulation should require the third party to pay the funds only to the agency and have the agency arrange and pay for the travel. This is a practical, operational question which we have researched further. Starting with the FPPC’s administrative staff, we asked how a small state agency like the Commission could effectively handle a third party payment for agency employee travel to attend training. If a third party paid the airline and hotel directly, the agency would prepare a gift to agency report but would have no

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<sup>2</sup> Section 87200 includes: “elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.”

other administrative requirements. If the FPPC received funds for travel from the third party directly, either before the trip or as a reimbursement, the agency would have to prepare a budget revision with the Department of Finance and set up a reimbursement account to receive these funds. From the reimbursement account there are several different ways to pay a vendor – through the claims schedule process where the state controller pays the vendor with a revolving fund check and then the agency makes a replenishment claim to the state controller. There is more of an accounting paper trail if the travel payments are reimbursed through the agency, but there is significant added administrative burden.

We spoke with a Department of Personnel Administration travel specialist who stated that third party payments for state agency travel could either be made directly or through the reimbursement process. Under federal gift to agency statutes, many agencies have written policies on accepting third party payments for travel. For example, under the U.S. Department of Justice procedure there are two ways reimbursement may be made. The first is payment in-kind. In this instance, the entity provides the employee with an airline ticket, pays the hotel bill, and no money ever exchanges hands. The procedures memo states that this is the preferred method. The second way is through reimbursement. The employee uses his or her government issued credit card to charge the expenses. Upon return, the employee completes a travel voucher and gets reimbursement through the office. The entity then reimburses the office, not the employee. The money is then deposited back into the office's travel budget. Similarly, the proposed regulation contemplates that a third party could either pay the agency or an airline or hotel directly, but not an agency employee.

Calls to the Technical Assistance Division show numerous instances where it would not be practical or feasible for the travel payment to be made directly to the agency. For example, Technical Assistance recently got a call from a state agency about staff travel to a training conference. A systems corporation is putting on an information technology training conference to which the agency has paid to send their entire IT staff in previous years. Due to the agency's budget problems, the corporation has offered to provide hotel rooms to state agency staff attending the conference, as a gift to the agency. The conference is a large event and the corporation had prepaid a block of rooms at the hotel where the conference is being held to reserve the rooms and get a discount. In this instance, it would not be feasible for the agency to receive a payment from the third party and then pay for the hotel rooms. Other calls where payment to the agency is not feasible have involved a business using some of its frequent flyer miles to provide air travel for a government employee.

Travel arrangements often need to be approved and made expeditiously. The additional steps required for an agency to receive and process a check from an outside party and make the travel arrangements independently are cumbersome and may simply not happen in time. It has been staff's advice for some years under the gift to agency regulation that a third party may pay the hotel or airline for travel directly. Technical Assistance raised this issue for clarity last December to attempt to codify in the regulation the advice it had been providing callers. By expressly referring to the definition of payment and stating that a payment includes "the payment for, or provision of, goods or services to an agency" the regulation would codify this advice, permitting third parties to pay airlines and hotels directly. Staff supports codification of this advice because of the practical considerations discussed. It does not seem necessary to prohibit a

direct payment to an airline or hotel at this time, particularly when the regulation is being amended to enhance reporting of gifts to agency payments, and add other safeguards such as capping travel payments to the agency's own reimbursement rates and requiring preapproval.

**College and University Research Provision.** This provision in paragraph (e) is substantively unchanged from the original version of Regulation 18944.2. The provision clarifies that a donation to a California public college or university received under the academic decisions provision of Regulation 18702.4(c) will be a gift to the college or university. As to academic decisions, Regulation 18702.4(c) provides that neither disclosure nor disqualification is required in connection with teaching decisions or decisions by a teacher or researcher to personally pursue a course of academic study or research, to apply for funds to finance such a project, and to choose the manner and methodology to conduct the study or research. As discussed at the interested persons meeting, the vast majority of donations, gifts and grants that a college or university receives do not fall under the gift to agency regulation, because there is no personal benefit to a particular official involved. Examples of these donations include alumni contributions, funds to endow a chair, and general unrestricted research funds, and donations to fund an onsite conference or lecture series.

**Payments from the Federal Government.** Paragraph (f) was added to clarify that payments received by a state or local agency from the federal government for education, training, or other inter-agency programs, will not be considered a gift to the public official who receives a personal benefit from the payment. Under this provision, if the federal Environmental Protection Agency pays for an employee of Cal EPA to attend a joint training, Cal EPA does not need to process this as a gift to the agency.

**League of Cities Issue.** The League of California Cities general counsel asked in March whether the changes to the regulation would affect the reporting of local officials' travel to League of Cities meetings. The Statement of Economic Interests instructions contain an example involving a city council member who is a board member of the League of California Cities. The League reimburses its board members for travel, lodging and meals associated with board meetings. If the city council member provides equal or greater consideration for the travel and lodging when he or she participates in the meeting, the reimbursements are reported as income. (See *Benninghoven* Advice Letters, No. I-98-177 and I-93-298.) Under paragraph (c), proposed Regulation 18944.2 only applies to "[a] payment that is otherwise a gift to a public official, as defined in Section 82028...." If the League's reimbursements qualify as income, rather than a gift to local officials, the gift to agency regulation does not apply.

**Outreach.** Staff is contacting groups that might be affected by changes to this regulation, including the Assn. of California Water Agencies, the California State Assn. of Counties, the California Special Districts Assn., California Redevelopment Assn., and the League of California Cities, and will report on these groups' comments at the May meeting.

**Staff Recommendation:** Staff recommends that the Commission approve the repeal and readoption of Regulation 18944.2.

Attachments: 1 – Proposed Regulation 18944.2  
2 – Repeal Regulation 18944.2  
3 – Gift to Agency Form and Instructions (draft)